

**United States House of Representatives  
Committee on Energy and Commerce  
Subcommittee on Oversight and Investigations  
July 26, 2006**

**Written Statement of  
Alwyn H. Luckey and Stephen W. Mullins**

Thank you for the opportunity to come and speak with you, members of The Committee on Energy and Commerce and Subcommittee on Oversight and Investigation in reference to Silica Litigation screenings. For purposes of simplicity, there will be one spokesperson for the law firms of Luckey & Mullins, PLLC and Barton & Williams. Our firms' joint ventured representation of silica clients and each firm is mutually responsible for their representation.

This has been a difficult year for our law firms, as we were both located on the Gulf Coast of Mississippi, and were directly in the path of Hurricane Katrina. Our lives and families have been deeply and severely affected by Hurricane Katrina.

Luckey & Mullins, PLLC

While the Luckey & Mullins firm, located in Ocean Springs, Mississippi was spared from the rising water which afflicted much of the region, the firm sustained significant damage as a result of the storm. The office roof was partially destroyed which caused leaking in the main office, adjoining warehouse and mezzanine. The leaking caused damage to the structure, furniture, equipment and files throughout the office. On November 1, 2005, the Luckey & Mullins office caught fire during an electric storm and was without power in a majority of its offices for 17 days.

In addition to the problems Hurricane Katrina created for the law firms of Barton and Williams and Luckey & Mullins, the storm destroyed many of the homes of the lawyers associated with these firms. Also, Mr. Luckey's wife was seriously injured in a car accident which occurred during the family's evacuation.

Although our professional and personal recovery efforts continue, we have worked diligently to continue service to our clients, many of whom were similarly affected by the Hurricane. Likewise, we have been, and will continue to be, fully cooperative to your requests throughout this process. This response, together with our previous submissions, represents our good faith and best efforts to address the questions and concerns raised by the Committee.

Barton and Williams Law Firm

Located 2 miles from the former home of United States Senator Trent Lott in Pascagoula, Mississippi, the law firm of Barton and Williams, suffered complete losses to documents and computers contained in two (2) of its three (3) office buildings. The first floor of the main office building was similarly flooded and damaged. In addition to these losses to documents and property, Barton and Williams lost the service of three (3) of its five (5) attorneys and one (1) staff member, all of whom chose to move outside of the area following the Hurricane.

## **The Committee's Investigation**

### The Medical Screening Process

On February 17, 2006, our two firms received a letter from the Committee detailing its interest in the findings of Janis Jack, presiding Judge of MDL No. 1553. There exists an interest in the role lawyers played in the medical screening process.

### Firm participation at screenings

Medical testing companies were responsible for providing space and access to the client necessary for the attending physician to provide a reasonable medical evaluation, without any interference or influence of our firms. Findings were solely those of the attending physician.

Our screenings were primarily through RTS (Respiratory Testing Services) and a fewer number of clients were screened by a Mississippi licensed physician through a Mississippi testing company. Registered nurses employed by the screening companies were present at many screenings to assist the physician during the physical examinations.

Staff members from our law firms were present to ensure that individuals who presented for testing met our firms' restrictive criteria for testing. This was achieved primarily through the completion of work history questionnaires that would provide information helpful to our evaluation of a possible claim. Some of the requested information included the age of the individual tested, the individual's work history and the individual's job title and responsibilities. This information is gathered in order to view a broad spectrum of the case and not one solely based upon exposure or medical screening.

### Abnormal medical findings

We are aware of the Committee's concern regarding individuals who received abnormal x-ray readings. It is our understanding, that if an individual had an abnormal x-ray finding, he or she would promptly be informed by the doctor at the screening site and recommend that he or she see their local physician immediately. He would also be given an abnormal x-ray finding report at that time. A copy of these findings and a recommendation that he see a local physician immediately would also be mailed to the individual by certified mail by RTS.

At the medical screening, if the individual was found to have a silica related disease he would be seen by a lawyer of our firm or a paralegal of our firm where we would, again, stress the significance and seriousness of the abnormal x-ray finding.

Later, when any abnormal x-ray finding was received in our respective law offices, it was our custom and practice that another letter went out to the individual reiterating the doctor's concern and stressing the significance of the abnormal x-ray finding and the importance of seeking a local physician for further diagnosis and treatment.

In the event that a life threatening or serious medical condition was discovered, a more detailed letter explaining the serious condition, using the doctor's language from the medical report, was mailed to the client while additionally enclosing another copy of the same medical report previously provided to him at the time of the screening.

Finally, it was our firms' custom and practice that the silica department attorney, or in their absence, a paralegal employee, would call these individuals to discuss the

abnormal x-ray finding report to so that they fully understood it and urged that they need to be seen by a local physician promptly.

#### Other screening criteria

Before agreeing to represent any client, generally our firm mailed Questionnaires or met with prospective clients to fill out detailed Questionnaires in order to determine the veracity of someone who claimed they were exposure to silica. We researched numerous publications including literally thousands of pages of documentation from OSHA and NIOSH. We also read numerous depositions and trial transcripts before beginning our silica litigation endeavor. In doing so, our firms set up one of the most restrictive criteria of anyone accepting cases of silica related disease. We took generally accepted criteria and made it more stringent<sup>1</sup>. We generally verified the information by

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<sup>1</sup> On February 18, 2005, Charlie Foster, a representative of Respiratory Testing Services, provided the following testimony:

Q: [by Plaintiffs' Counsel]: Okay. For example, the Barton & Williams law firm, Alwyn Luckey law firm group, do you recall what the criteria is for the people that we want you to test for us?

A: [by Charlie Foster]: Yes sir. We've had a couple, but starting off right there with five years prior to 1985 exposure, either sandblaster, sandblaster helper or sandblasting crew that wore a mask or respirator or a hood.

Q: And so being prior to 1985, that would give you at least, at that point, a ten-year latency period, wouldn't it?

A: Yes, sir.

Q: And you knew that the criteria that my firm was establishing was, we want sandblasters or immediate helpers, somebody that worked with sandblasting. Correct?

A: Yes, sir.

Q: And we also made it as a part of the criteria that they had at least five years exposure. Do you agree?

A: Yes, sir.

Q: Do you recall that that corresponds somewhat with what – well, you weren't here when Dr. Levy testified were you?

A: No, sir.

Q: Do you what Dr. Levy's criteria is for making a silicosis diagnosis?

A: No. But I know I work for other law firms, it's a lot less. We go from '90 to '92 at least two years of exposure. And I've even talked to Mr. Lynch about easing up on the criteria, and he never would. He stayed right with what-

Q: Okay. So consistently, my firm has stuck with a five-year criteria.

A: Yes.

ordering social security earnings reports records and other information from the initial stage of litigation. Additionally, we conducted physical work site inspections and document production projects requiring documents and information be provided by the work site owner/entity. Hence, this would allow us to know, with relative certainty, that there was substantial silica exposure to these workers (our client), before we engaged in any screening.

It should be noted that our respective law firms are only a few miles from the Northrop Grumman (fka Ingalls) Shipbuilding facility which is the one of the world's largest shipbuilders, our County is considered as one with industries known to create many, varied occupational hazards, including heavy silica exposure.

To our immediate West is the Avondale Shipyard and the industrial corridor North of the Gulf Coast, roughly located between Baton Rouge and New Orleans. This geographic area is sometimes referred to as "cancer alley". According to leading health and occupational organizations, both of these areas display elevated rates of silicosis.

We believed that, in this immediate geographic area, there were individuals with silicosis who needed representation. With this knowledge, together with requests for representation on a regular basis from individuals in this County, we embarked in good faith into this project.

We believe that our rate of findings of a silica related injury versus no silica related injury was low, and was generally in the vicinity of approximately 25-35%. <sup>2</sup>

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*In Re: Silica Products Liability Litigation*, MDL No. 1553, Daubert Hrg. Transcr. 193:20-194:23 (Feb. 18, 2005).

<sup>2</sup> The information necessary to fully calculate this figure is partially found in documents previously submitted to the MDL. Other documents were also destroyed by Hurricane Katrina.

Our aforementioned protocol relates solely to screenings initiated by our offices. We cannot make any assertions regarding the screening process as it relates to those clients who were referred to us by other attorneys who performed independent screenings.

#### Screening date/Findings date discrepancy

It has been pointed out to us in meetings with Congressional staff members that there was at least one occasion that a silica reading initiated by our firm in 2004 or 2005 was from x-rays that are dated 1999. We intend to make clear to the Committee that this was not a policy of our firm and was an aberration or mistake. To explain, in the process of providing the x-rays to a physician for review, our staff made a mistake by not including all of the client's x-rays. They simply took the first x-ray from the cabinets and provided those to the physician without including any other x-rays that belonged to that particular individual.

As of today, we are not able to confirm further information surrounding these x-rays as they are in the possession of the Clerk of the MDL.

#### Request for consideration

One of our primary concerns is the effect that the criticisms of Janis Jack, the Judge presiding over the MDL, and other sources will have upon people with a silicosis disease. Today, the result is that questioned medical reports are adversely affecting cases with reports from physicians that are not at issue. For example, we are involved a situation with Dr. Freidman (the silica defendants' expert designated in the MDL) who issued an IME report of silicosis of a plaintiff represented by our firm, with accompanying biopsy also confirming silica induced disease. This particular case is

‘stuck in legal limbo’ in the Texas MDL only because it was part of the same case where certain medical reports are now being questioned.

Our firm represents several victims of silica induced disease where their exposure occurred in Alabama. They are adversely affected by Judge Jack’s criticism of the screening process. For reasons related to the criticism of certain medical doctors, no Alabama law firm will assist these claimants.

### **CONCLUSION**

Litigation procedures provide vehicles for discovering the complete information necessary to determine whether a case should be withdrawn, tried, settled or dismissed. In other words, to piece together ‘the whole story’. The medical screening process is one of various methods utilized by the firms to determine our confidence in an individual’s silica related matter. Our participation in information gathering, whether medical or otherwise, was to evaluate the prospective client’s claim and to obtain same without any interference with or influence upon the information gathered.

Thank you again as we await your questions.